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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 990

MORTON FRIEDMAN, PETITIONER

v.

LEWIS B. SCHWELLENBACH, INDIVIDUALLY AND AS SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 62–71) is reported at 65 F. Supp. 254. The opinion of the United States Court of Appeals for the District of Columbia (R. 73–76) is not as yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1946 (R. 77). The

petition for a writ of certiorari was filed February 6, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a person having no civil service status, who was transferred to a war agency subject to the Civil Service Commission's approval as to his qualifications for a War Service appointment and after the Commission had determined that he was not qualified for such appointment because of doubt as to his loyalty to the United States and his services had been terminated, is entitled to mandatory, injunctive, and declaratory relief, including an order directing his reinstatement.

EXECUTIVE ORDERS, AND RULES AND REGULATIONS INVOLVED

The pertinent portions of the executive orders, and rules and regulations involved are set forth in the Appendix, *infra*, pp. 22–25.

STATEMENT

On May 29, 1942, petitioner, who had been employed by the Federal Works Agency of the United States in positions excepted from the classified civil service (Act of November 26, 1940, Section 1, 54 Stat. 1211, 5 U. S. C. 631 (a)), was transferred to a war agency, the Division of

Central Administrative Services, Office for Emergency Management, where, for the first time, he came within the jurisdiction of the Civil Service Commission (R. 47–48). This transfer was expressly made "subject to character investigation," after which, if the findings were favorable, he became entitled to a War Service appointment.[1] Without change in status, petitioner, while said investigation was being conducted and while certain of the events hereinafter described were taking place, was involved first in an interoffice transfer on September 16, 1942, to the War Manpower Commission Personnel Branch, Central Administrative Services, Office for Emergency Management, and later, on March 27, 1943, in a group transfer shifting all personnel functions of the Office for Emergency Management to its constituent agencies—in petitioner's case, the War Manpower Commission (R. 47).

The Civil Service Commission's War Service Regulation II, Section 3, effective March 16, 1942, and prepared and adopted by the Civil Service Commission pursuant to Executive Orders No. 9063 and 9067 (Appendix, pp. 22–25), provides as follows:

> SEC. 3. *Disqualifications.*—An applicant may be denied examination and an eligible may be denied appointment for any of

[1] A War Service appointment did not confer a classified, civil service status but permitted the retention of the person so appointed to a tenure limited to the duration of the war and six months thereafter (R. 45, 63).

the following reasons: (a) Dismissal from the service for delinquency or misconduct; (b) physical or mental unfitness for the position for which he applies: *Provided,* that the physical requirements may be waived in the case of any person entitled to disability preference; (c) criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct; (d) intentional false statements as to any material fact, or deception or fraud in securing examination or appointment; (e) refusal to furnish testimony as required by Civil Service Rule XIV; (f) habitual use of intoxicating beverages to excess; (g) a reasonable doubt as to his loyalty to the Government of the United States; (h) any legal disqualification for appointment.

Any of the reasons stated in the foregoing subdivisions from (b) through (h) inclusive, shall also be sufficient cause for removal from the service.

Subsequent to petitioner's conditional transfer to the Division of Administrative Services, Office for Emergency Management, the Commission conducted an investigation as to petitioner's qualifications. As a result of the investigation, the Commission determined that there was a reasonable doubt as to petitioner's loyalty to the Government of the United States and that petitioner was therefore not eligible for federal employment in a War Service status. On October 27, 1942, the Commission requested Central Administrative

Services, Office for Emergency Management, to terminate petitioner's services (R. 50, 54). Petitioner appealed from this decision and a hearing was held on January 26, 1943, before the Board of Appeals and Review of the Commission (R. 50).[2] At the hearing petitioner was given full opportunity to present for consideration all the evidence and testimony he desired on the question of his eligibility for a War Service appointment (R. 37–39). Thereafter, the Commission, upon review and reconsideration of the entire record, reaffirmed its determination that petitioner was ineligible for a War Service appointment and by letter of May 3, 1943, so notified petitioner (R. 55). The Office of Emergency Management was also notified on May 3, 1943, that the Commission's previous action had been affirmed (R. 56). On March 27, 1943, however, petitioner had been part of a group transfer to the War Manpower Commission (R. 47). In a letter of May 17, 1943, from the War Manpower Commission to the Civil Service Commission, it was stated that the letter of May 3, 1943, was the first official notification which had been received by the War Manpower Commission concerning

[2] While the record is silent in this respect, we are advised by the Civil Service Commission that the Board of Appeals and Review recommended to the Commission by a two-to-one vote that petitioner be declared eligible for a War Service appointment.

the case and because of that fact they wished "to refrain from taking action in this matter until the War Manpower Commission can make a preliminary investigation of the facts in the case, and give consideration to the possibility of a formal appeal by this agency * * * for hearing by the United States Civil Service Commission" (R. 57–58). On October 13, 1943, the War Manpower Commission requested the Civil Service Commission to reconsider petitioner's case (R. 50). Following reconsideration, the Civil Service Commission advised the War Manpower Commission by letter dated February 25, 1944, that it had reaffirmed its original action (R. 51, 58–59). On March 23, 1944, the War Manpower Commission notified the Civil Service Commission that "Mr. Friedman has requested a personal appearance before the Commissioners and action looking toward his separation is, therefore, not being taken pending this hearing" (R. 59–60). The Civil Service Commission, in accordance with its usual policy, did not object to petitioner's continued employment pending his appeal (R. 51).

Petitioner was heard by the Commission on April 19, 1944 (R. 60). The Commission, after giving "most careful consideration" to the case, advised petitioner by letter of June 5, 1944, that it affirmed its previous action (R. 7–9). This letter set forth some of the principal factors which

led the Commission to conclude that there was a reasonable doubt as to petitioner's loyalty, but the letter did not constitute, nor did it purport to constitute, a full statement of the specific reasons for the determination of the Civil Service Commission which was based upon the complete investigation which had been made, including confidential reports of the Federal Bureau of Investigation (R. 51).

The War Manpower Commission terminated petitioner's employment as of July 10, 1944, plus accumulated annual leave to September 12, 1944 (R. 2, 52, 60–61). On August 16, 1944, the Civil Service Commission advised petitioner that any applications or eligibilities for examinations he might have had been cancelled[3] because of information disclosed through investigation which indicated that petitioner did not measure up to the standard of suitability and fitness maintained for Government employment (R. 52, 61). The records of the Civil Service Commission did not disclose, however, that petitioner had any applications or eligibilities for examinations then pending (R. 52).

On December 24, 1944, petitioner filed a complaint in the United States District Court for the District of Columbia seeking "a declaratory judgment, mandamus, injunction and further

[3] See United States Civil Service Commission, *Civil Service Act, Rules and Regulations Annotated* (1943), p. 68.

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relief" (R. 1).[4] He sought a declaratory judgment that he was improperly dismissed from his position with the War Manpower Commission and is entitled to reinstatement for the reason that his dismissal was based upon improper grounds in violation of the First and Fifth Amendments to the Constitution of the United States, the Civil Service Act (Act of January 16, 1883, 22 Stat. 403; 5 U. S. C. 632 *et seq.*, the Hatch Act, Section 9 (a) (Act of August 2, 1939, 53 Stat. 1147, 1148, as amended by the Act of July 19, 1940, Sec. 2, 54 Stat. 767, 18 U. S. C. 61h), and Civil Service Rule I, and that the Civil Service Commission had no authority to require the dismissal of petitioner but that the War Manpower Commission was required to exercise its own discretion in determining whether there existed proper cause for

[4] Originally named as defendants were Paul V. McNutt, individually and as Chairman of the War Manpower Commission, and Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming, individually and as members of the United States Civil Service Commission. Because of the resignation of Mr. McNutt as Chairman of the War Manpower Commission and the transfer on September 19, 1945, pursuant to Executive Order No. 9617 (10 F. R. 11929), of that wartime agency and all its functions, employees, and records, with certain exceptions not here material, to the Department of Labor, Lewis B. Schwellenbach, individually and as Secretary of Labor, was substituted as a party defendant (R. 43). After defendant Lucille Foster McMillin had ceased to hold office as a member of the Civil Service Commission and Frances Perkins had been appointed as a member and inducted into office, an order was entered substituting Frances Perkins, individually and as a member of the Civil Service Commission, as a party defendant (R. 76a).

the removal of the petitioner. Petitioner further sought an order directing the then defendant McNutt, as Chairman of the War Manpower Commission, to reinstate him. He also sought an injunction enjoining the members of the Civil Service Commission from interfering in any way with his reinstatement with the War Manpower Commission or his employment in any other position, for which he might otherwise be eligible, with any other agency of the United States Government, and an order directing the members of the Civil Service Commission to withdraw their cancellation of any pending applications and eligibilities for examination which he might have.

After respondents answered, both sides moved for summary judgment and filed supporting affidavits. The district court granted respondents' motion for summary judgment, holding that the Civil Service Commission had "acted pursuant to law and the courts are without jurisdiction to control its action so long as it complies with the law" (R. 70–71). On appeal, the court below affirmed the judgment of the district court. After holding that the War Service Regulation in question "was reasonable and proper and the making of it was well within the scope of the authority conferred on the Commission by the Act and the two executive orders", the Court stated (R. 76):

> It is beyond our province, and it was beyond the province of the District Court, to review the finding of the Civil Service

Commission that it had a reasonable doubt as to whether Friedman was loyal to the government, because it has long been held that the courts will not review managerial acts, not clearly arbitrary, of executive officials performed within the scope of their authority, and will not substitute their judgment in such matters for that of the officials.

ARGUMENT

Although the petition herein, as well as the *amicus* brief of the United Public Workers of America (C. I. O.), devotes most of its discussion to an alleged infringement of petitioner's civil liberties, the action which petitioner has brought is relatively simple in character, and its disposition is, we submit, controlled by principles which make it unnecessary to pass upon the civil liberty contentions which petitioner seeks to urge. Petitioner neither has nor claims a civil service status. What he seeks is a declaratory judgment that he was illegally dismissed and an order directing his reappointment to a position wherein his tenure would be limited to the duration of the war and six months thereafter. We do not understand him to challenge the legality of the Civil Service Rule pursuant to which he was removed, nor to contend that any procedural requirement, established either by statutes or regulations, has not been followed. His contention is and must be that

the determination of the Civil Service Commission in respect of any finding made by it under War Service Regulation II, 3, is subject to judicial review, at least to the extent that it is arbitrary and capricious. We submit that under settled law a determination of this character by the Civil Service Commission is not subject to judicial review and that even if it were the determination was not arbitrary or capricious.

1. It is settled law that the courts will not review the acts of executive officials performed within the scope of the executive authority, nor will the court substitute its judgment for that of the officials. *Decatur* v. *Paulding,* 14 Pet. 497, 515; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 131–132. This principle of non-intervention in the internal administration of the executive branch of the Government has been uniformly applied in the field of personnel administration. *Keim* v. *United States,* 177 U. S. 290; *Eberlein* v. *United States,* 257 U. S. 82; *White* v. *Berry,* 171 U. S. 366; *Hammond* v. *Hull,* 131 F. 2d 23 (App. D. C.), certiorari denied, 318 U. S. 777; *Love* v. *United States,* 108 F. 2d 43 (C. C. A. 8), certiorari denied, 309 U. S. 673; *Levine* v. *Farley,* 107 F. 2d 186 (App. D. C.), certiorari denied, 308 U. S. 622; *United States ex rel. Taylor* v. *Taft,* 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *Lellmann* v. *United States,* 37 C. Cls. 128; *Miller* v. *United States,* 45 C. Cls. 509; *Kellom* v. *United*

States, 55 C. Cls. 174; *Golding* v. *United States,* 78 C. Cls. 682, certiorari denied, 292 U. S. 643; *Bennett* v. *United States,* 89 C. Cls. 322; *Bratton* v. *United States,* 90 C. Cls. 604; *Block* v. *Sassaman,* 26 F. Supp. 105 (D. Minn.); *Waterman* v. *Somervell,* 34 F. Supp. 695 (S. D. N. Y.), certiorari to C. C. A. 2 denied, 317 U. S. 630.

In *Keim* v. *United States,* 177 U. S. 290, the plaintiff was discharged as inefficient. He brought suit in the Court of Claims requesting that court to find that his discharge was "without just cause" and that at the time of his discharge he was an efficient clerk who had "discharged his duties faithfully and efficiently" and possessed "the necessary business capacity for the proper discharge of the duties of said clerkship" (177 U. S. at 292). These findings the Court of Claims declined to make, "deeming said requested findings, if true, to be irrelevant to the issue presented" (177 U. S. at 292). In affirming the dismissal of plaintiff's action, this Court stated (177 U. S. at 292, 293):

> Upon these facts we are asked to decide whether the courts may supervise the action of the head of a department in discharging one of the clerks therein.
>
> It has been repeatedly adjudged that the courts have no general supervising power over the proceedings and action of the various administrative departments of government. * * *

> The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power. * * *

Under the principle established by the above cases, the action of the Civil Service Commission here involved is not subject to review by the courts.[5] This principle has particular applicability to this case. Here petitioner was in no sense a permanent employee, nor did he have any tenure or civil service status whatsoever. He has been given a conditional transfer, which for present purposes is completely analogous to a conditional appointment, and such conditional transfer was expressly made subject to investigation. He is in no better position therefore than any outsider who applies for a position with the United States Government, and, in such circumstances, it would seem clear that no one would question the right of

[5] The instant case is sharply distinguishable from *United States* v. *Wickersham*, 201 U. S. 390, and *United States* v. *Elchibegoff*, No. 442, this Term, writ dismissed Feb. 3, 1947. Recovery was allowed in both those cases because of the failure of the government officials to follow procedural requirements prescribed by statute in dismissing the employee. Here, the procedural requirements were followed.

the executive branch of the Government to refuse to employ him if in its opinion he did not have the requisite qualifications. It is submitted that the court below was clearly correct in holding that it was not within its province to interfere with the Civil Service Commission in its refusal to approve petitioner for a War Service appointment.

2. Moreover, even assuming that a limited right of judicial review existed, the Commission's determination was not arbitrary or capricious. The petitioner admits (R. 9, 35) that he was not merely a member but was "prominently and actively affiliated" with the American Peace Mobilization, a recognized Communist "front" organization,* "participated actively in their

* The Attorney General has found that American Peace Mobilization (of which the Washington Peace Mobilization was a subsidiary) was a Communist-inspired and Communist "front" organization (Memorandum of the Attorney General reprinted in full in Hearings before the Special Committee on Un-American Activities, House of Representatives, 78th Cong., 2d Sess., *Investigation of Un-American Propaganda Activities in the United States* (Vol. 17), pp. 10282–10284):

"American Peace Mobilization was formed in the summer of 1940, under the auspices of the Communist Party and the Young Communist League as a "front" organization designed to mold American opinion against participation in the war against Germany. Its existence terminated within a month after the German invasion of Russia, when it became American People's Mobilization and adopted a program favoring complete assistance to Britain, Russia, and China. * * *

* * * * *

meetings and affairs," and was "active in the affairs of the Washington Peace Mobilization and served on several of its committees." Moreover, petitioner admitted that he was opposed to the participation of the United States in the war before the invasion of Russia by Germany, but thereafter soon changed his mind and adopted the view that the United States should enter the war (R. 7–9). This shift in position was one of the tests recognized not only by the Commis-

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" * * * American Peace Mobilization sponsored the march on Washington, January 25-27, 1941, when the delegates attempted to picket the Capitol and to see congressional and administration leaders. Later, on April 4 and 5, 1941, it sponsored the so-called American People's Meeting in New York City. These meetings were dominated by leaders of Communist-front organizations and the programs and pamphlets issued in connection with these meetings contained advertisements and greetings of Communist-penetrated organizations. * * * Each of the foregoing positions [taken by American Peace Mobilization] conformed exactly to the Communist Party line. American Peace Mobilization numbered among its officers and sponsors several leading Communists and the heads of several Communist-penetrated groups.

* * * * *

"Ever since 1918, and before, there have been in existence in the United States organizations devoted to peace and to the goal of keeping America out of war. Not one of these organizations, however, was formally represented as an organization in any way in American Peace Mobilization. These organizations devoted to antiwar activities have been continuously ignored in the columns of the Daily Worker and other Communist publications, whereas these same periodicals gave full support to American Peace Mobilization."

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sion for determining extreme Communistic sympathies (see Appendix, pp. 26–31) but also was a frequently employed test for determining Communist "party line" affiliations.[7]

Confronted with this evidence the Commission had to make a decision under the applicable regulation. It may be argued that this evidence is insufficient to compel the conclusion that petitioner was disloyal to the United States, but it certainly cannot be seriously contended that it is not sufficient to present noncapricious reasons for doubt as to such loyalty. In these circumstances the Commission found, as it rationally could, that there was reasonable doubt as to petitioner's loyalty.[8]

3. Petitioner contends that the Civil Service

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[7] The Communist Party line test has been frequently cited. See, e.g., Report of the Special Committee on Un-American Activities, H. Rep. 1311, 78th Cong., 2d Sess., *Investigation of Un-American Propaganda Activities in the United States*, p. 186.

[8] Civil Service Commissioner Arthur S. Flemming, testifying before the Subcommittee of the Committee on Appropriations of the House of Representatives (78th Cong., 2d Sess.), discussed the Commission's position concerning its requirement that a person's loyalty to the United States be established before he is appointed to a war job. He stated (Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 2d Sess., Independent Offices Appropriation Bill for 1945 (December 9, 1943), pp. 1083-1087):

"* * * the Commission keeps in mind the fact that working for the Government is a privilege which is extended

Commission infringed his constitutional rights under the First and Fifth Amendments by investigating his political expressions, actions, and affiliations in order to discover whether there was a reasonable doubt as to his loyalty, and also that the standards applied by the Commission in determining his loyalty conflicted with applicable laws. We submit that these contentions are without merit.

(a) Prior to the enactment of the Civil Service Act in 1883, practically all federal employees were appointed and removed, advanced and demoted, on the basis of their political opinions and affiliations (United States Civil Service Commission,

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to citizens of this country, and is not a right. No applicant or appointee can demand that the records before us prove beyond reasonable doubt that he is guilty of some of the accusations made against him. On the contrary, the record must establish that he is a fit person to be entrusted with the duties which devolve upon a public official in time of war.

* * * * *

"No one has questioned the Commission's right to inquire as to whether or not a person is pro-Fascist, pro-Nazi, or pro-Japanese.

"The Commission believes that a member of the Communist party, or a follower of the Communist Party line has clearly indicated that his primary loyalty is to a foreign political group owing its allegiance to a foreign government and that there is, therefore, a strong presumption in favor of his willingness to take steps designed to overthrow our constitutional form of government, if directed so to do. Clearly we are justified in classifying such a person as a potentially disloyal person."

History of the Federal Civil Service (1941)). And although this practice was frequently deplored, it was to our knowledge never held unconstitutional. Nor, indeed was the unconstitutionality of the exercise of the executive power on this basis even suggested.[9] In fact, the cases point in the opposite direction (*In the Matter of Hennen,* 13 Pet. 230; *White* v. *Berry,* 171 U. S. 366; *United States ex rel. Taylor* v. *Taft,* 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *United States ex rel. Palmer* v. *Lapp,* 244 Fed. 377, 384–385 (C. C. A. 6)), and it was only the constitutionality of civil service *restrictions* upon the executive's power of appointment which were subject to constitutional doubts (see 13 Op. Atty. Gen. 516).

If the United States Government has the power in time of war to inquire into loyalty at all, and that right is conceded (R. 69), that right has meaning only if the statements and acts of the person under consideration for appointment may be examined, for, as the courts have frequently declared, "loyalty is a matter of the heart and mind." *Ex parte Endo,* 323 U. S. 283, 302; *Hirabayashi* v. *United States,* 320 U. S. 81, 107; *Schurmann* v. *United States,*

[9] It is, of course, common knowledge that many offices and positions in the Federal service, not subject to the Civil Service Act, have traditionally been filled and held by persons of a particular political affiliation without any intimation that this is violative of the fundamental law.

264 Fed. 917, 920 (C. C. A. 9), appeal dismissed, 257 U. S. 621. In no way other than by probing opinions, conduct, and affiliations, political in a broad sense, can doubts as to loyalty ordinarily be resolved. As Wyzanski, D. J., declared in another context, "Saboteurs do not parade with foreign credentials of professional competence." *Von Knorr* v. *Miles,* 60 F. Supp. 962, 970 (D. Mass.), modified on other grounds, 156 F. 2d 287 (C. C. A. 1).

Nor can petitioner successfully claim a deprivation of property without due process of law in contravention of the Fifth Amendment. It is plain that he could not have any "property" in his federal employment, and particularly is this true in the instant case where petitioner had no civil service status but only a conditional appointment. *Love* v. *United States,* 108 F. 2d 43, 45–46 (C. C. A. 8), certiorari denied, 309 U. S. 673; *Ligare* v. *Harries,* 128 F. 2d 582, 583 (C. C. A. 7); *People* v. *Crane,* 214 N. Y. 154, 170, 179–180, affirmed, 239 U. S. 195.

(b) The action of the Commission is not in conflict with the Civil Service Act nor the Hatch Act. While the former provides that no person has the right to use his official authority or influence to coerce the political action of any person, and the latter provides that all persons subject to the Act may express "their opinions on all political subjects," there is nothing in either Act which countenances conduct disloyal to the United States. And here the question is

not one of freedom of political opinion, but whether the course of conduct followed by petitioner indicated a possible loyalty to the Communist party line creating a reasonable doubt as to petitioner's loyalty to the United States.

The attitude of Congress toward Communism is set forth in the Selective Training and Service Act of 1940, c. 720, Section 8 (i), 54 Stat. 885, 892, 50 U. S. C. App. 308 (i), which states that:

> "It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund."

A like attitude is illustrated by the Acts of June 26, 1940, 54 Stat. 611, c. 432, Section 15 (f); July 1, 1941, 55 Stat. 396, c. 266, Section 10 (f); and July 2, 1942, 56 Stat. 634, c. 479, Section 9 (f), which provide that:

> No alien, no Communist, and no member of any Nazi Bund Organization shall be given employment or continued in employment on any work project prosecuted under the appropriations contained in this joint resolution. * * *

We submit that there is no conflict between the course adopted by the Commission and Congressional intent as evidenced by the applicable statutes.

4. Contrary to the contentions of petitioner

(Pet. 30–32) and the United Public Workers of America (Brief for Amicus Curiae, pp. 13–14), the power to provide during the war emergency for "filling positions in the Federal service with qualified persons" and for their retention or dismissal was delegated to the Civil Service Commission, not to the War Manpower Commission or other war agencies. Executive Orders No. 9063 and 9067 (Appendix, *infra*, pp. 22–25) specifically authorized the Civil Service Commission to prescribe regulations with respect to "recruitment, placement, and changes in status of personnel for all departments, independent establishments, and other Federal agencies," and provided that persons appointed under these procedures *"in the discretion of the Civil Service Commission,* may be retained for the duration of the war and for six months thereafter." (Italics provided.)

CONCLUSION

The decision below is correct and there exists no conflict. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
JOHN F. BAECHER,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
RAY B. HOUSTON,
Attorneys.

FEBRUARY 1947.

APPENDIX

1. Executive Order No. 9063, dated February 16, 1942, provides as follows (7 F. R. 1075):

AUTHORIZING THE CIVIL SERVICE COMMISSION TO ADOPT SPECIAL PROCEDURES RELATING TO RECRUITMENT, PLACEMENT, AND CHANGES IN STATUS OF PERSONNEL FOR THE FEDERAL SERVICE

WHEREAS millions of the citizens of this country are engaged in war industries or have been or expect to be called to duty with the armed forces of the United States, which militates against their competing for employment in the Federal service, and greatly diminishes the number of persons available for competitive positions in the Federal service; and

WHEREAS it is essential that there be no delay during the present emergency in filling positions in the Federal service with qualified persons;

NOW, THEREFORE, by virtue of the authority vested in me by section 2 of the Civil Service Act (22 Stat. 404), it is hereby ordered as follows:

1. The United States Civil Service Commission is authorized to adopt and prescribe such special procedures and regulations as it may determine to be necessary in connection with the recruitment, placement, and changes in status of personnel for all departments, independent establishments, and other Federal agencies, except positions in the field service of the postal

establishment. The procedures and regulations thus adopted and prescribed shall be binding with respect to all positions affected thereby which are subject to the provisions of the Civil Service Act and Rules.

2. Persons appointed solely by reason of any special procedures adopted under authority of this order to positions subject to the provisions of the Civil Service Act and Rules shall not thereby acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,
February 16, 1942.

2. Executive Order No. 9067, dated February 20, 1942, provides as follows (7 F. R. 1407):

PROVIDING FOR THE TRANSFER OF PERSONNEL TO WAR AGENCIES

By virtue of the authority vested in me by the Civil Service Act (22 Stat. 403), and by Section 1753 of the Revised Statutes of the United States (U. S. C., title 5, sec. 631), and in order to expedite the transfer of personnel to war agencies, it is hereby ordered as follows:

1. For the purpose of facilitating transfers of employees under the provisions of this Order, the Director of the Bureau of the Budget shall from time to time establish priority classifications of the several Executive departments and agencies, or of parts or activities thereof, in respect to their relative importance to the war program, and such classifications shall be con-

trolling as to transfers under the provisions of this Order.

2. The Civil Service Commission is authorized to secure information as to employees of Executive departments and agencies who are deemed competent to perform essential war work in departments or agencies having a higher priority classification, and, with the consent of the employee concerned, to effect the transfer of any such employee to meet the personnel needs of a department or agency having a higher priority classification.

3. Whenever a transfer is proposed under the provisions of section 2, it shall become effective not later than 10 days after notification to the department or agency in which the employee is serving. If, within that period, the employing department or agency presents to the Civil Service Commission evidence that its work will be jeopardized by the loss of the employee's services, the Civil Service Commission shall consider such evidence and make a final decision. Transfers to departments and agencies having the same or lower classifications, shall not be effected without the consent of the department or agency in which the employee is serving.

4. Any employee transferred pursuant to this Order shall be entitled to all the reemployment benefits provided by Executive Order No. 8973 [6 F. R. 6420] of December 12, 1941.

5. The Civil Service Commission is authorized to adopt such rules and regulations and to establish such procedures as may be necessary to carry out its responsibilities under this Order. Each Executive department and agency shall promptly fur-

nish the Civil Service Commission such information regarding its employees as the Commission may require for the effectuation of this Order.

6. This Order shall supersede any provisions of Executive Order No. 8973 of December 12, 1941, or of any other Executive Order or Rule of the Civil Service Commission which is in conflict therewith.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,
February 20, 1942.

3. The Civil Service Commission's War Service Regulation II, Section 3, provides as follows:

SEC. 3. *Disqualifications.*—An applicant may be denied examination and an eligible may be denied appointment for any of the following reasons: (a) Dismissal from the service for delinquency or misconduct; (b) physical or mental unfitness for the position for which he applies: *Provided,* that the physical requirements may be waived in the case of any person entitled to disability preference; (c) criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct; (d) intentional false statements as to any material fact, or deception or fraud in securing examination or appointment; (e) refusal to furnish testimony as required by Civil Service Rule XIV; (f) habitual use of intoxicating beverages to excess; (g) a reasonable doubt as to his loyalty to the Government of the United States; (h) any legal disqualification for appointment.

Any of the reasons stated in the foregoing subdivisions from (b) through (h) inclusive, shall also be sufficient cause for removal from the service.

4. The Communist Party Line test of loyalty employed by the Civil Service Commission is as follows (89 Cong. Rec. 10254–10255):

> The Commission, on the basis of its experience in handling thousands of these cases, has developed certain policy standards. It is of primary importance to record the fact that the Civil Service Commission will not consider charges against persons who are found merely to possess a progressive interest in seeking changes in the country's economic and political structure but who adhere firmly to the principle that such changes are only to be brought about through orderly democratic processes.
>
> On the other side of the picture, there have evolved certain fairly well-defined categories, where, assuming adequate evidence, a negative conclusion follows. Typical of these latter categories are the following:
>
> Persons who have advocated revolution or the use of force, if necessary, in order to bring about political or economic changes.
>
> Persons whose association with organizations in agreement with the attitudes and policies of the Nazis, Fascists, or Communists, has been such as to indicate sympathy with the programs of the Nazis, Fascists, or Communists.
>
> Persons who have expressed a desire to see the Axis Nations emerge as the victor in the present conflict.
>
> Persons whose record shows that they are more concerned with the success or failure of a foreign government or a foreign political system than with the welfare of the United States Government.

It is clear, of course, that tied up with the last point mentioned above is the whole question of communism. In connection with the handling of these cases, the Commission has issued the following instructions to its staff:

THE COMMUNIST PARTY LINE

A good definition of a Communist is "one who has followed the Communist Party line through one or more changes." The Communist Party line is the policy advocated by the various factions of the Komintern. It is the policy of preserving and protecting the Soviet Union by whatever means are determined by its leaders.

It is not of great importance that the line during the first 10 years of the existence of the Communist Party be intimately known. It is, however, imperative that any person investigating Communist activity should know the last three major line changes. These are set forth below.

REVOLUTIONARY PERIOD 1929 TO 1934

On May 6, 1929, a Communist Party spokesman said: "I think the moment is not far off when a revolutionary crisis will develop in America." From that time on all Communist activity in this country was actively directed toward violent overthrow of this Government. The literature of the party constantly promised the members that the day of reckoning had arrived; "that the shackles of capitalism were to be thrown off and that the decadent capitalist government was to be replaced by a proletarian dictatorship." In order to reduce the masses to the depth of despair necessary to reduce their resistance to armed

revolution, it was essential, in the opinion of the Communists, that the capitalist government refrain from any social changes which might "drug the masses into continued acceptance of the capitalistic system." For this reason the Communists sought to wreck and destroy attempts by the New Deal to pass social legislation. Any person daring to advance such legislation was violently hated by them and branded with the term of contempt "Social Fascist." They included in this category President Roosevelt and the New Deal, John L. Lewis, Norman Thomas and his Socialist Party, and most liberals. They harassed the Socialist Party in its attempt to set up social security and unemployed workers' benefits organizations, and generally attempted to keep the United States in economic chaos. It must be remembered that this period included the worst years of the depression.

COLLECTIVE SECURITY PERIOD DECEMBER 1934 TO AUGUST 1939

In December 1934 Earl Browder returned from a trip to Russia and immediately called a halt to the revolutionary program, and at the same time launched the most effective period of Communist infiltration in this country. This was the Popular Front period. The party made a complete about face. They ceased to apply the term "Social Fascist" to such persons as President Roosevelt, Thomas, and Lewis. They adopted the heroes of the American Revolution as forerunners of American communism. The picture of Abraham Lincoln took its place beside that of Stalin. Where they had previously at-

tacked attempts at social reform they now created a multiplicity of "front" organizations to further such causes. Where they had previously chosen to ignore the rise of fascism in Germany, they now bitterly attacked Hitler and called for a united front of the great democracies—Soviet Russia, Great Britain, China, and the United States—to stop the Mad Dog of Europe. The Daily Worker demanded punitive action against Japan and boycotting of other Axis countries. Where they had previously expressed nothing but hatred toward liberals and other radicals, they now courted these persons assiduously even to the extent of giving a testimonial dinner for Norman Thomas, the arch foe of communism in the years gone by.

COMMUNAZI PERIOD AUGUST 1939 TO JUNE 1941

In August 1939 Russia signed a nonaggression pact with Germany and the Communist Party line made a complete about face. Immediately all preparations for defense were termed by the Communists as warmongering. The British war effort was reviled in the columns of the Daily Worker as an imperialistic war for the perpetuation of capitalist rule.

Communists, through their stooges in the party front organization, violently opposed such defense measures as the conscription bill and the lend-lease bill and extensions of the Monroe Doctrine to the Western Hemisphere as a whole. The Communists allied themselves with other radical peace groups in an attempt to keep America from defending itself and from fighting against Hitler. They spread anti-Yankee imperialist propaganda

throughout South America in an effort to divide the Americas. President Roosevelt was denounced as a warmonger. His defense program was termed an effort to drag the American people into an imperialistic war. All of the familiar and time-worn anti-war arguments were adopted by the Communists. In the youth faction the expression "The Yanks are not coming" became extremely popular. Their war cry became, "No A. E. F., no convoys." While the Communists in America did not openly support Adolph Hitler and the Axis, they revived every device for drawing attention away from the injustice perpetrated by that regime. American Communists and fellow travelers sided with Russia in the war with Finland.

COLLECTIVE SECURITY PERIOD (REVIVED) JUNE 22, 1941, TO DATE

With the attack of Russia by Germany on this date, the Communist Party line over night reverted again to the collective-security phase. Communists began to vie with patriotic Americans in purchasing Defense bonds and volunteering for civilian defense duties. The slogan "The Yanks are not coming," was changed over night to "Stop Hitler Now," and "The Yanks are not coming too late." This is perhaps the most difficult period in which to detect an American Communist.

An earmark of an American Communist today is an advanced degree of patiotism. It is, therefore, difficult to distinguish friend from foe, but it must be remembered that this cloak of patiotism was not donned until June 23, 1941. However, it must also be remembered that many loyal Americans

were sincerely isolationist in viewpoint until the necessity of our participation in the war become increasingly evident. The Communist will try to lead one to think that he is of that category. The fact which gives him away is the suddenness of his switch.

It must be made clear that to identify one as a Communist or a Fellow Traveler (or a sympathizer), it will be necessary to show a following of the above line through one or more changes. Many liberals were taken in by the Communists in the first collective-security period but became aware of the true situation with the change in line occasioned by the signing of the communazi pact in August 1939.

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